THE DOCTRINE OF AN INHERENT RIGHT OF LOCAL SELF-GOVERNMENT.

I. The Extent of its Application by American Courts.

In his somewhat recent compendious treatise on the law of municipal corporations Judge Eugene McQuillin gives repeated expression to the view that, wholly in the absence of any constitutional provision expressly or impliedly in point, municipal corporations in the United States may be protected from legislative encroachment by the application of the doctrine of an inherent right of local self-government. For example, after referring without specification to provisions that have been introduced in state constitutions with the end in view of securing certain rights to municipal corporations, he says:[1]

"But apart from these restrictions on legislative interference, from the historical examination of this subject, it becomes manifest that local self-government of the municipality does not spring from nor exist by virtue of written constitutions; that it is not a mere privilege, conferred by the central authority, but that the people in each municipality exercise their franchises under the protection of the fundamental principles just indicated, which were not questioned or doubted when the state constitutions were adopted, and which in the opinion of Judge Cooley and other eminent American jurists, no power in the state can legally disregard."

Again, in connection with his definition of a municipal corporation, he declares that "the characteristic feature beyond all others is the inherent right of local self-government;"[2] and elsewhere he says:[3]

"Legislative control of municipal corporations is not without its limitations. Many jurisdictions have demonstrated frequently the historical fact that, in this country, from the beginning, political powers have been exercised by the citizens of the various local communities, *as local communities,* and as generally recognized, this constitutes the most important feature of our system of government. Moreover, it is difficult to accept in its entirety the doctrine of absolute unlimited legislative control, if the view should be adopted which is undoubtedly historically correct, that local

[1] Municipal Corporations, I, § 70, p. 156.

[2] *Ibid.*, I, § 107, p. 254.

[3] *Ibid.*, I, § 167, pp. 384, 385.

self-government of the municipal corporation does not spring from, nor exist by virtue of, written constitutions, nor is it a mere privilege conferred by the central authority. The fact is, as repeatedly pointed out, that the people of the various organized communities exercise their rights of local self-government under the protection of these fundamental principles which were accepted, without doubt or question, when the several state constitutions were promulgated.

"Therefore, it appears clear that in a government in which the legislative power of the state is not omnipotent, and in which it is axiomatic that local self-government is not a mere privilege, but a matter of absolute political right, the existence of unlimited authority in the law making body to concentrate all the powers of local government in the state does not exist."

Further quotations are doubtless unnecessary, but in illustration of the metaphysical basis of the eminent commentator's view, the following excerpt[4] is not without interest:

"The community, with certain local rights and privileges, and property, as buildings and public improvements, which the legislature incorporates by giving it a legal entity and personality, is not created by legislative action. The legislature merely creates this legal personality and invests it with certain privileges and powers, some of which affect the state at large, but most of which relate to supplying local necessities and conveniences."

Not only by direct expression but also by general implication throughout the entire first volume of his work, Judge McQuillin treats the doctrine of an inherent right of local self-government as if it were the generally accepted doctrine of American courts—a doctrine that has been transformed into a definite rule of law and as such is regularly applied by the courts to defeat legislation that has impinged upon those rights of municipal corporations which may be regarded as embraced within the concept of the term "self-government." In view of this fact, it seems worth while to determine the extent to which this doctrine has been actually applied in adjudicated cases and to subject to critical analysis the arguments that have been gathered to its support. The object of this paper is to review the cases in which the doctrine has received application. A second paper will deal with the historical facts and legal principles that furnish its alleged foundation.

The State of Michigan is cited as the jurisdiction *par excellence* in which the doctrine of an inherent right of local self-gov-

[4] *Ibid.*, I, § 169, p. 388.

ernment has been asserted; and the classic opinion referred to is that handed down by the eminent jurist Judge Cooley in the case of the *People ex rel. Le Roy* v. *Hurlbut.*[5] This case arose over an act of the legislature which created a board of public works for the city of Detroit, which board was given absolute control over the streets, public parks, and grounds of the city, over the construction of the city hall, fire houses, and all other public buildings except school houses, as well as over the water-works and sewer system. The offending feature of the act was that the first members of this powerful board were named in the act itself.

In examining the opinions expressed in this case it is of the utmost importance to note that the existing constitution of the State contained the following clause:[6]

"Judicial officers of cities and villages shall be elected, and all other officers shall be elected or appointed at such times and in such manner as the legislature shall direct."

The opinions of the judges were rendered *seriatim.* Judge Christiancy, after considering certain minor contentions, expressed himself upon the principal point as follows:[7]

"But it is further insisted by the counsel for the respondents that the intention of *this provision* of the constitution [*i. e.,* the provision just quoted] was, and its fair and natural meaning is that judicial officers of cities and villages shall be elected by the *electors of such cities and villages* at such time and in such manner as the legislature may direct, and that all other officers of such cities and villages shall be elected by the electors thereof or appointed by such authorities thereof. And such, I confess, is the inference of intention which I draw from the provision and the *subject matters* to which it relates. It is, however, true, that it is but an inference; . . . yet in respect to the election, the inference is very strong and satisfactory. . . .

"The inference that the appointments referred to in this provision were intended "to be local appointments" may not be so palpable. . . .

"But when we recur to the history of the country, . . . when we take all these matters into consideration, the conclusion becomes very strong that nothing of this kind [*i. e.,* appointment of local officers by the legislature] could have been intended *by the provision.*"

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[5](1871) 24 Mich. 44.

[6]Const. of 1850, Art XV, sec. 14.

[7]24 Mich. at p. 65.

Clearly the learned judge was here discussing only the meaning of an express provision of the constitution. For this purpose he very reasonably had resort to the history of local government in the country and in the State in order to ascertain the probable meaning which the framers of the fundamental law had in mind when they wrote the uncertain clause relating to the election and appointment of city and village officers.

So also Chief Justice Campbell, after delimiting and distinguishing the opinion expressed by the same court a few years earlier in the case of *People ex rel. Drake* v. *Mahaney*,[8] asserted that we must study the *terms* of the constitution in the light of their "settled meaning before its adoption." So studied, it was manifest that that instrument was adopted "on the theory of local self-government; and the intention to preserve it is quite apparent." He reached the conclusion that "the only reasonable meaning *of the constitutional clause in question* is, that when the legislature has designated the time and manner of appointment or election, the local authority shall fill the offices so ordained."[9] In spite of certain unguarded expressions that are found in this opinion,[10] it seems scarcely necessary to remark that the argument of the chief justice was, like that of Judge Christiancy, directed primarily to the matter of interpreting a *specific* constitutional provision of somewhat uncertain import.

Judge Graves, who spoke last in order, rendered only a brief opinion in which he agreed in the main with the views of the chief justice.

But it is the third opinion uttered—that of Judge Cooley—which has been the never ending source of inspiration and authority to those who in later years have cited this case in support of the doctrine of an inherent right of local self-government. After disposing briefly of certain minor contentions and stating that the question before the court was broadly and nakedly "whether local self-government in this State is or is not a mere privilege, conceded by the legislature in its discretion, and which

[8](1865) 13 Mich. 481; *infra*, p. 198, n. 22.

[9]24 Mich. at p. 90. The italics are interpolated.

[10]Such, for example, as the following (p. 87): "The rights preserved [in the constitution] are ancient rights, and the municipal bodies recognized in it, and required to be perpetuated, were already existing, with known elements and functions. They were not towns or counties, or cities or villages, in the abstract—or municipalities which had lost all their old liberties by central usurpation—but American and Michigan municipalities of common law origin, and having no less than common law franchises."

may be withdrawn at any time at its pleasure," the distinguished judge entered upon a lengthy discussion of historical writings in order to show that from time out of mind local governments in the United States have traditionally enjoyed certain independent powers, and among these "the power to choose in some form the persons who are to administer the local regulations." His effort was to show:[11]

"*First*, that the constitution has been adopted in view of a system of local government, well understood and tolerably uniform in character, existing from the very earliest settlement of the country, never for a moment suspended or displaced, and the continued existence of which is assumed; and *second*, that the liberties of the people have generally been supposed to spring from, and be dependent upon, that system."

The part of the opinion devoted to this discussion is much too long for extended quotation here. One or two passages will suffice to show that certain expressions of view may unquestionably be instanced in support of the doctrine of the inherent right of local self-government. For example:[12]

"If we look into the several state constitutions to see what verbal restrictions have heretofore been placed upon legislative authority in this regard [*i. e.*, for the protection of the right of local self-government], we shall find them very few and simple. We have taken great pains to surround the life, liberty, and property of the individual with guaranties, but we have not, as a general thing, guarded local government with similar protections. We must assume either an intention that the legislative control should be constant and absolute, or, on the other hand, that there are certain fundamental principles in our general framework of government, which are within the contemplation of the people when they agree upon the written charter, subject to which the delegations of authority to the several departments of government have been made. That this last is the case, appears to me too plain for serious controversy."

And again:[13]

"The state may mould local institutions according to its view of policy or expediency; but local government is a matter of absolute right, and the state cannot take it away. It would be the boldest mockery to speak of a city possessing municipal liberty where the state not only shaped its government but at discretion

[11] p. 98.
[12] p. 97.
[13] p. 108.

sent its own agents to administer it; or to call that system one of constitutional freedom under which it would be equally admissible to allow the people full control in their local affairs or no control at all."

However substantial such expressions may be in support of the doctrine in question, the important point to be noted is the conclusion that was reached in this interesting and remarkable opinion. In the end the learned judge said:[14]

"In view of these historical facts, and of these general principles, the question recurs whether our State Constitution can be so construed as to confer upon the legislature the power to appoint for the municipalities the officers who are to manage the property, interests, and rights in which their own people alone are concerned.

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"But I think that, *so far as is important to a decision of the case before us,* there is an *express* recognition of the right of local authority by the Constitution.[15] That instrument provides (Art. XV, Sec. 14) that 'judicial officers of cities and villages shall be elected; and all other officers shall be elected or appointed at such time and in such manner as the legislature may direct.' It is conceded that all elections must, under this section, be by the electors of the municipality. But it is to be observed that there is no express declaration to that effect to be found in the Constitution; and it may well be asked what there is to localize the elections any more than the appointments. The answer must be, that examining the whole instrument a general intent is found pervading it, which clearly indicates that these elections are to be by the local voters, not by the legislature, or by the people of a larger territory than that immediately concerned."

In plain point of fact this is the most pertinent part of the opinion of Judge Cooley in the Hurlbut case. It is true that in the final roundup he declared that the act could not be sustained "either on general principles or on the words of the constitution," thus indicating that he rested upon two distinguishable grounds. But he also declared in unmistakable language that these "words of the constitution" were all that was "important to the decision of the case." It would seem, therefore, that his elaborate argument in support of the existence of a legal right of local self-government independent of constitutional provisions was not only confessedly but also logically dictum. For surely the learned judge did not intend to convey the impression that the "general

[14] pp. 105, 109.

[15] The italics are interpolated.

principles" of our government furnish a foundation for a definite rule of law that is quite as secure and satisfactory as an express provision of the constitution in point. Moreover, when due weight is given to the other opinions that were read in the Hurlbut case, it is almost incredible that the case should be repeatedly cited, without qualification, as sustaining the doctrine of an inherent right of local self-government.

Questions similar to that involved in the Hurlbut case have been presented to the Michigan courts in a number of other cases. In 1871 the legislature of the State created a board of park commissioners for the city of Detroit, the members of the board being named in the act of its establishment. In the case of *People ex rel. Attorney General* v. *Lothrop*[16] the court, following the doctrine of the Hurlbut case, decided at the same term of the court, held that such officers could be appointed only by the local authority, but that the action of the common council in approving the location of a park and the plans of the commissioners amounted to a local ratification of the legislative appointment of the commissioners. This, said the court, was the practical equivalent of local appointment. Two years later the legislature passed another act which, in place of the advisory and conditional powers originally conferred upon the park commissioners vested in them the absolute power to locate a public park for the city and to determine, within certain limits, the amount of the debt which the city should incur for the purpose. It was held by the court, in *People ex rel. Park Commissioners.* v. *Common Council of Detroit,*[17] that the local authorities had not accepted the legislative appointment of the park commissioners with the much larger powers conferred by the act of 1873, and that in consequence, under the ruling of the Hurlbut case, the act was void. Again the court, speaking through Judge Cooley, indulged in a number of broad assertions in respect to the *right* of local self-government, but the opinion also clearly declared that "what we said in that [the Hurlbut] case we here repeat, that . . . it is a fundamental principle in this state, recognized and perpetuated by *express* provisions of the constitution, that the people of every hamlet, town, and city of the state are entitled to the benefits of local self-government."

[16](1872) 24 Mich. 235.

[17](1873) 28 Mich. 228.

Subsequent to the issue of judgment in this case, the park commissioners modified their demands for the issue of bonds and the common council voluntarily accepted their proposal. The mayor, however, refused to join in this acceptance, and the issue of constitutionality was once more brought before the supreme court.[18] It was held that the ratification by the common council was not sufficient, under the doctrine of the Lothrop case, to make these appointments local appointments within the meaning of the rule applied by the court in the Hurlbut case. As has been noted, the only rule applied in the latter case was that a *specific* provision of the state constitution required, in the view of the court, that municipal officers should be locally elected or locally appointed.

From this brief analysis it can scarcely be said with reason that the cases that arose over this park board controversy established the doctrine that a legal *right* of local selection of local officers inheres in the "general principles" of our system of government.[19]

There are other cases in the Michigan jurisdiction that have been settled by the application of the rule of the Hurlbut case. Thus an act of the legislature providing for the provisional appointment of a superintendent of public works for the city of Detroit was held void by reference to that case, the court being convinced that no exigency existed that made such method of appointment necessary.[20] So also an act which created a board of public safety for Bay City and provided for the appointment of its members by the governor was held to be in violation of the constitution because the fire department was placed in control of this board.[21] On the other hand, it was held that the rule of the Hurlbut case applied only to those officers who performed func-

[18]People *ex rel* Park Commissioners *v.* Mayor of Detroit (1874) 29 Mich. 343.

[19]It is perfectly apparent, moreover, from the careful study of these park commission cases, that the opinion of the court turned largely upon the theory that the act of 1873 operated to deprive the city of property without due process of law. We are not here concerned with municipal "rights" that may be referred to *any* expressed constitutional provision. It may nevertheless be remarked in passing that the application of the due-process-of-law clause to defeat legislation of the kind here in question was of exceedingly doubtful propriety. See McBain, "Due Process of Law and the Power of the Legislature to Compel a Municipal Corporation to Levy a Tax or Incur a Debt for a Strictly Local Purpose", 14 Columbia Law Rev. 407-428.

[20]Moreland *v.* Millen (1901) 126 Mich. 381, 85 N. W. 882.

[21]Davidson *v.* Hine (1908) 151 Mich. 294.

tions of local as distinguished from state concern. Thus provision might be made for the central appointment of a municipal police[22] or health board[23] on the ground that such boards, although jurisdictionally local, were functionally state rather than municipal agencies.[24]

From this survey of Michigan cases it seems not unreasonable to conclude that whatever "right" of local self-government has been asserted by the courts of that State has been founded upon an express provision of the constitution which declared that "judicial officers of cities and villages shall be elected, and all other officers shall be elected or appointed at such time and in such manner as the legislature may direct." In interpreting this clause the court read into it certain words that were not expressed but were, in the opinion of the court, sufficiently implied. In substance it was held: first, that when those who drafted the clause wrote "elected or appointed" they intended to write *"locally* elected or appointed;" and second, that when they wrote "all other officers" they intended to write "all other officers *who serve the city or village in its local or municipal capacity and not in its capacity as an agent of the State.*"

In the State of Indiana there can be no question that the doctrine of an inherent right of local self-government has been unequivocally accepted and applied; and the arguments in support of the doctrine have perhaps nowhere been more clearly developed than in the case of *State ex rel. Holt* v. *Denny.*[25] This case arose over an act which provided that in cities having a population of 29,000 or more inhabitants there should be a "board of metropolitan police and fire department" composed of three commissioners. The first commissioners were to be elected by the legislature itself; and it was objected that this feature of the act violated the "general principle" or "inherent right" of local self-

[22]People *ex rel.* Drake *v.* Mahaney (1865) 13 Mich. 481. This case was decided six years before the Hurlbut case solely on the ground that an act could not be declared void "on 'general principles', and, especially because violating the fundamental principles of our system." Although never overruled as to this point, the distinction between city officers who perform local functions and those who perform state functions was read into this earlier decision by the opinions rendered in the Hurlbut and subsequent cases.

[23]Daroch *v.* Moore (1895) 105 Mich. 120, 63 N. W. 424.

[24]But see Attorney General *v.* Lowrey (1902) 131 Mich. 639, 92 N. W. 289, where this distinction was apparently not applied to permit a legislative appointment of educational officers.

[25](1888) 118 Ind. 449, 21 N. E. 274.

government. It seems worth while to present at some length the opinion that was handed down in this case. Said the court:[26]

"At the adoption of the State Constitution all power was vested in the people of the State. The people still retain all power, except such as they expressly delegated to the several departments of the State government by the adoption of the Constitution. . . . In construing and giving an interpretation to the Constitution, we must take into consideration the situation as it existed at the time of its adoption, the fact expressed in the instrument that all power is inherent in the people, the rights and powers vested in and then exercised by the people, the existence of cities and towns and the right of local self-government exercised by them, and the laws in force and form of government existing at the time of its adoption.

"One of the fundamental principles of municipal corporations is the right of local self-government, including the right to choose local officers to administer the affairs of the municipality . . .

"As we interpret the theory of our State government, this right of local self-government, vested in, exercised and enjoyed by, the people of the municipalities of the State at the time of the adoption of the Constitution, yet remains in them, unless expressly yielded up and granted to one of the branches of the State government by the Constitution."

At this point the court proceeded to review a number of provisions of the constitution of the State, not, however, to ascertain whether the city was expressly *protected* against legislative interference in this manner, but to determine whether the legislature was expressly *granted* the power thus to interfere. In concluding this review the court declared:[27]

"The only remaining provision which we think it can possibly be claimed granted any power to the General Assembly to fill offices, is section 1, article 15, which provides: "All officers whose appointments are not otherwise provided for in this Constitution shall be chosen in such manner as now is, or hereafter may be, prescribed by law." . . . Town officers[28] were at that time elected by the people of the respective towns of the State, in the exercise of their rights of local self-government. As applied to town officers, the language used certainly cannot be construed as an intention on the part of the people to surrender their right of local self-government, and as granting the power to the General Assembly to elect or appoint local officers in the various towns of the State. Indeed, to place any other construction than we

[26] pp. 457, 458, 459, 460.

[27] pp. 465, 469, 470, 475.

[28] By express statement (p. 462) the court included cities and villages in the term "town".

have upon such language, and hold that the General Assembly has the right to appoint town officers for one or two cities or towns of the State, . . . would be granting to the General Assembly the power to elect every county, township and town officer not expressly named and the manner of their election pointed out by the Constitution. . . .

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"The conclusion we unhesitatingly reach is, that the right of local self-government in towns and cities of this State is vested in the people of the respective municipalities, and that the General Assembly has no right to appoint the officers to manage and administer municipal affairs. . . .

"There are many things which are included within the definition of police power which are purely local, and of which the State has only an indirect interest, and which, under our State government, are exclusively within the control of local authorities. Such we regard the fire department and the control of the streets, sidewalks, sewers and waterworks of a city or town. . . .

"We hold that the right to provide and maintain a fire department in a town or city is one of the rights which are vested in municipalities, is to be exercised by them, and is not subject to legislative interference, except in so far as that body may prescribe rules to aid the people of the municipality in the exercise of such right; that such right is an element of local self-government which was vested in the people of the municipalities at the time of the adoption of the Constitution, and was not parted with by them; that so much of the statute under consideration as relates to the management and control of the fire departments of cities is unconstitutional and void."

The line of reasoning that was thus employed by the Indiana court needs no comment. It is perfectly clear, whatever may be thought of its soundness. It has been adopted also in at least two other Indiana cases,[29] both of which likewise arose over legislative attempts at interference with municipal fire departments.

For a brief period of years the supreme court of Nebraska gave full support to the doctrine that a right of local self-government belongs inherently to municipal corporations. In 1887 the court indeed refused to declare void, on the ground that it was "repugnant to the spirit of the constitution," an act of the legislature providing a state appointed fire and police commission[30] for "metropolitan cities"—the same being Omaha. In 1898, however, this case was expressly overruled by *State ex rel. Attorney Gen-*

[29]Evansville *v.* State *ex rel* Blend (1888) 118 Ind. 426, 21 N. E. 267, and State *ex rel* Geake *v.* Fox (1902) 128 Ind. 63 N. E. 19.

[30]State *ex rel* Simeral *v.* Seavey (1887) 22 Neb. 454, 35 N. W. 228.

eral v. *Moores,*[31] where the validity of a similar act was drawn into question. The court, speaking through Judge Norval, observed:[32]

"There is no express provision of the constitution in this state which gives municipal corporations the power to select their officers or to manage their own affairs, nor is there any clause to be found in that instrument which in express terms inhibits the legislature from conferring upon the governor the power to appoint municipal officers to manage and control purely local affairs. . . . The inhibition on the power of the legislature may be by implication as well as by expression. Laws may be, and have been, declared invalid although not repugnant to any express restriction contained in the fundamental law."

The court quoted at great length and with unqualified approval the dictum expressed in the New York case of *Rathbone* v. *Wirth,*[33] the dictum of Judge Cooley in the Hurlbut case, and the pertinent opinion delivered in the Denny case. Upon the authority of these opinions it was held that since local self-government existed prior to the adoption of the state constitution and had been well understood at the time of its adoption, it must be construed to have been incorporated into that instrument by "general implication." So incorporated, the doctrine operated to prevent the legislature from providing for the central appointment of officers in charge of a city fire department.

The Moores case was followed in the case of *State ex rel. Attorney General* v. *Kennedy.*[34] But this rule of law was short-lived in the Nebraska jurisdiction. The decision of the Moores case was by a bare majority of the court, the minority filing a lengthy and vigorous dissent. In 1901 the case was summarily overturned.[35] The court did not again enter into extended argument of the principles involved. There was merely a reference to the exhaustive opinions handed down in the original Moores case, and unconditional endorsement was given to the dissenting opinion there expressed.

The supreme court of Iowa is also on record as having in at least one case given somewhat hesitating and cautious, but none the less actual, endorsement to the doctrine here under discussion.

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[31](1898) 55 Neb. 480, 76 N. W. 175.

[32]At p. 489.

[33](1896) 150 N. Y. 459, 45 N. E. 15; *infra.*

[34](1900) 60 Neb. 300, 83 N. W. 87.

[35]Redell *v.* Moores (1901) 63 Neb. 219, 88 N. W. 243.

In the case of *State ex rel. White* v. *Barker*[36] an act of the legislature providing that a board of waterworks trustees in cities of the first class should be appointed by the district court of the counties in which such cities were located was held void as applied to Sioux City, where the waterworks had been owned and managed by the city itself for many years previous to the enactment. The first point discussed by the court was that the act in question deprived the city of a right of local self-government. After confirming, upon the authority of many cases cited, the absolute power of the legislature over municipal corporations in respect to those functions in which they act in a so-called agency capacity for the state government, and after asserting, likewise with the support of numerous citations, that "the dual capacity of such corporations has long been recognized," the opinion recited:[37]

"Some of the cases cited proceed on the theory that the legislature has no power, after creating a municipal corporation, to take away from it the right of local self-government. The argument is that the intention to preserve and perpetuate the ancient right of local self-government, which the law recognizes as of common-law origin and having no less than common law franchises, is apparent throughout the scope of most American constitutions. . . . We are not to be understood as fully approving all that is said in some of the cases regarding the right of local self-government, nor do we mean to hold that there is an unwritten constitution complete and comprehensive in itself. All that we intend to announce is that written constitutions should be construed with reference to and in the light of well recognized and fundamental principles lying back of all constitutions, and constituting the very warp and woof of these fabrics. A law may be within the inhibition of the constitution as well by implication as by expression. *Page* v. *Allen,* 58 Pa. St. 338, (98 Am. Dec. 272); *People* v. *Gillette,* 159 N. Y. 125, (53 N. E. Rep. 755); *Bailey* v. *Railroad Co.,* 4 Har. (Del.) 389, (4 Am. Dec. 593). But we will not elaborate this thought. Suffice it to say that we have already recognized the principle announced in *State* v. *City of Des Moines,*[38] 103 Ia. 76 . . . Some of the cases we have cited hold to the doctrine that the right of the inhabitants of a municipal corporation to local self-government is one of the rights retained by the people [within the meaning of the well-known clause of constitutional bills of rights.] But we need not

[36](1902) 116 Iowa 96, 89 N. W. 204.

[37]pp. 104, 105.

[38]This case did not involve the doctrine of an inherent right of local self government. It was cited here merely in support of the view that a law may be declared void on *general* constitutional implication.

and do not go to this extent, except in so far as private and proprietary rights and interests are concerned. Municipal corporations are recognized by the constitution [in a clause which prohibited the enactment of special legislation in respect to such corporations]. . . . We are also of the opinion that there are other well defined limits on the power of the legislature in dealing with such bodies."

It is obvious that the learned judge felt himself to be treading on somewhat uncertain ground; but it is likewise obvious that, in spite of his refusal of unqualified endorsement of certain other less guarded expressions of judicial opinion, he nevertheless was of the opinion that the act in question was invalid on some sort of general principle, although it was clearly not in violation of any express provision or specific implication of the constitution.

The supreme court of Kentucky has applied the doctrine of an inherent right of local self-government in a single case—*City of Lexington* v. *Thompson*.[39] The statute that was involved increased the salaries of firemen in certain cities of the State. It was not contended that this statute violated any express or specifically implied provision of the constitution, although it is worthy of remark that the constitution contained somewhat elaborate provisions relating to the government of cities. The court held the law void on the ground that the power to regulate such salaries was not "governmental" and on the further ground that the "makers of the organic law" could not have "intended to permit the legislature to take charge of the petty salaries of every hamlet in the State." The argument of the court was in fact so lacking in logical development that it seems scarcely worth while to outline it in detail. It is sufficient merely to record the case in the list of those which have given application to the rule that the courts are competent to defend a municipal corporation in a right of local self-government without resort to any direct constitutional guarantee in point.

In the State of Texas, owing to the peculiar organization of the courts, the present status of the law in respect to the principle of the right of local self-government is somewhat uncertain. The highest courts of the State consist of a supreme court, a court of civil appeals, and a court of criminal appeals. Appeal lies from the court of civil appeals to the supreme court, but the decisions of the court of criminal appeals are final. There are, therefore,

[39](1902) 113 Ky. 540, 68 S. W. 477.

two courts of last resort in the state.[40] Apparently also the decision of neither court is binding upon the other,[41] even upon a question of constitutional law.

In April 1901, seven months after the city of Galveston had been devastated by a tidal wave, the legislature of Texas enacted a charter for the government of that city which proved to be the beginning of the modern movement for the so-called commission form of government. This act vested the entire governmental power of the city in the hands of five commissioners. Two of these were made subject to local election, and three of them were subject to appointment by the governor. The act was contested by the institution of two suits, one involving a sanitary ordinance of the commission imposing a penalty for violation, and the other an ordinance imposing license taxes upon vehicles. The first of these actions went for final determination to the court of criminal appeals. The second reached the supreme court of the State. The fundamental question involved in each of them was the same—namely, whether the feature of the act providing for the appointment of local officers by the governor was inhibited by the state constitution.

Decision upon this question was rendered first in the court of criminal appeals, in the case of *Ex parte Lewis*.[42] Speaking through Judge Henderson the court quoted at some length and with hearty approval, but with no apparent discrimination between dicta and germane argument, the opinions expressed in certain of the Michigan, Indiana, and Nebraska cases that we have already examined and in certain New York cases yet to be examined. So profoundly was the learned judge impressed with the soundness of the doctrine of an inherent right of local self-government, as he understood it to be expounded in other jurisdictions, that he was led to exclaim: "A persual of these opinions is like sounding a new note on the old Liberty Bell, and must inevitably thrill the heart of every patriotic American who loves the free institutions of our country." The opinion presented practically the same arguments in favor of the doctrine as those already noted. Elaborating somewhat more at length, however, upon the notion of

[40]Const. of Tex., Art. V, secs. 1-5, as amended in 1891.

[41]Commissioners' Court of Nolan County *v.* Beal (1904) 98 Tex. 104, 81 S. W. 526.

[42](1903) 45 Tex. Cr. 1, 73 S. W. 811.

powers reserved to the people by general implication, the court declared:[43]

"We do not understand that the constitution grants power which is not expressly reserved to the legislative body of the government. This is reserved to the people. Only the law-making power belongs to the legislature, and this must be in accordance with the principles of local self-government reserved to the people of the state, because the constitution says that all political power is inherent in the people, not in the legislature, and the right of local self-government is reserved to the state. . . . The Legislature is the law-making power, and to it alone is reserved the authority to make laws; but it has not right under the guise of its law-making authority to overturn the principles of local self-government which have been handed down to us from our fathers. Nor will it be considered that the right to make laws on the part of the Legislature carries with it the right to appoint to office, either by themselves or through an agent. They undoubtedly have the right to create offices and prescribe their duties, but here their law-making functions cease, and the filling of the offices belongs to the locality."

It would be unfair not to point out that, after exhausting the vocabulary of laudatory terms in praise of the doctrine of local self-government by general implication, the court in conclusion expressly asserted that it was unnecessary to apply this doctrine to defeat the law in question. In the article of the constitution devoted to suffrage there was a clause[44] which declared that "all qualified electors of the state, as herein described, who shall have resided for six months immediately preceding an election within the limits of any city or corporate town shall have the right to vote for mayor and all other elected officers." Passing to the consideration of this clause, the court said:[45]

"However, it is not necessary to rest this decision upon the implication [of a right of local self-government], as, in our opinion, the Constitution expressly prohibited the Legislature to either appoint directly, or through the Governor, the local municipal officers of cities and towns in as much as the Constitution expressly confers powers on the citizen voters of the municipality 'to elect the mayor and all other elective officers.' It is said that the article in question is merely to define the right of suffrage in cities. By this it would appear to concede that if the suffrage section relating to cities had occurred in Article 11, instead of in

[43] At p. 27.
[44] Art VI, sec. 3.
[45] At p. 28.

Article 6, there would be no question but that the office of mayor, at least, should be elective. . . . We cannot agree with this contention. . . . The Legislature cannot withhold from the municipal voter the right to vote for mayor, inasmuch as the Constitution confers this right; and it also confers the right upon the suffragans of the municipality to vote for other elective officers. What other elective officers? Evidently those that aforetimes the voters in the municipality had been accustomed to select at the ballot box."

Whatever may be thought of the reasonableness of the interpretation thus put upon the constitutional provision relating to suffrage, it is evident that the court, in spite of the cordial endorsement given to the doctrine of an inherent right of local self-government, rested the decision of this particular case largely, if not wholly, upon this express provision of the constitution.

A few months after the above opinion was handed down, decision was reached by the supreme court of Texas in case of *Brown* v. *City of Galveston*,[46] involving precisely the same question of law. At this point it need only be remarked that the opinion expressed in the Lewis case, both as to the doctrine of the right of local self-government by general implication and as to the interpretation of the suffrage clause of the constitution, was utterly and vigorously repudiated. As already remarked, however, it cannot be said that the Lewis case was overruled. In consequence of the co-equality of the courts the curious situation resulted that Galveston was operating under a charter that was invalid as to the exercise of police powers but valid as to the exercise of all other powers. Shortly before the decision of the question in the supreme court the legislature came to the rescue with a charter amendment which made all of the commissioners subject to local election.[47]

In the light of the conflict of opinion in Texas between courts of equal jurisdiction, and in the light of the weight given by the court of criminal appeals to an express provision of the constitution which it regarded as controlling, it can scarcely be said that the doctrine here under consideration has secured a firm foothold in that State.

In certain other jurisdictions the courts have occasionally given voice to incautious expressions of opinion that have been cited in support of the doctrine that a municipal corporation is protected

[46](1903) 97 Tex. 1, 75 S. W. 488.

[47]Act of March 30, 1903.

in a right of local self-government independently of any specific constitutional guarantee. Thus in New York the opinions expressed in *People ex rel. Wood* v. *Draper,*[48] *People ex rel. Bolton* v. *Albertson,*[49] and *Rathbone* v. *Wirth*[50] have been cited as sustaining such doctrine. It may be freely admitted that certain unguarded expressions of opinion in these cases may be separated from their context and pointed to as giving voice to the view that there are principles of local self-government which may be general implication be transformed into constitutional barriers against legislative encroachment. For example, in the Albertson case Judge Allen spoke for the court as follows:[51]

"This right of self-government lies at the foundation of our institutions, and cannot be disturbed or interfered with, even in respect to the smallest divisions into which the State is divided for governmental purposes, without weakening the entire foundation; and hence it is a right not only to be carefully guarded by every department of the government, but every infraction or invasion of it to be promptly met and condemned; especially by the courts, when such acts become the subject of judicial investigation."

Taken in isolation, this may be easily construed as an assertion of the doctrine of an inherent right of local self-government; but taken in the light of the opinion as a whole and in connection with the declaration of the court that "the purpose and object of section 2 of article 10 of the constitution, as is very obvious, was to secure to the several recognized civil and political divisions of the state the right of local self-government," it is perfectly patent that the court was discussing a right of self-government that was guaranteed by a specific provision of the constitution and not a right that was referable to abstract principles or general implication.

The section of the constitution to which the learned judge made reference declared that "all city, town and village officers, whose election or appointment is not provided for by this constitution shall be elected by the electors of such cities, towns and villages, or of some division thereof, or appointed by such authorities thereof, as the legislature shall designate for that purpose,"

[48](1857) 15 N. Y. 532; followed in People *ex rel.* McMullen *v.* Shepard (1867) 36 N. Y. 285.

[49](1973) 55 N. Y. 50.

[50](1896) 150 N. Y. 459, 45 N. E. 15.

[51]At p. 57.

and that "all other officers whose election or appointment is not provided for by this constitution, and all officers whose offices may hereafter be created by law, shall be elected by the people, or appointed, as the legislature may direct."[52] Here was clearly an express constitutional guarantee of at least one right of local self-government—the right of local selection of city, town, and village officers. All three of these cases arose over acts of the legislature which, it was contended, interfered with the right thus guaranteed to cities. The theme "local self-government" is one which perennially invites and inspires eloquent discourse. It is not surprising that the judges could not put aside so tempting an opportunity. But so far as the law itself is concerned the point of importance is that the question actually before the court in each of these cases involved *only* the interpretation and application of a *specific* provision of the fundamental law of the State. Whatever was said generally about the "right of local self-government" must be regarded either as dictum or as expository of the specific provision in question. To cite these New York cases in support of the doctrine of an inherent right of local self-government is wholly without justification.

A California case—that of *People* v. *Lynch*[53]—has likewise been occasionally cited in support of the doctrine here under discussion. In this case, which arose over an act of the state legislature legalizing a special assessment made in the city of Sacramento, it is perfectly true that Judge McKinstry had a good deal to say about the principles of local self-government. He expressed the opinion that the framers of the state constitution had the common American idea of a city when they used that term in the constitution, and that this idea involved the notion of self-government, which in turn involved the principle that local officers should exercise their own discretion in respect to internal affairs. It is also true that he cited with approval the dicta of certain Michigan cases concerning the principle of local self-government. But the first ground upon which he held the act to be void was that it violated the principle of equality in taxation—a principle that was specifically required by the state constitution. The other two judges who concurred in the final judgment of the court expressly and emphatically rejected all that was said by Judge McKinstry except that the act resulted in inequality of taxation.

[52]Art. X, sec. 2. Concerning the origin of this provision, see McBain, The Law and the Practice of Municipal Home Rule, pp. 32-34.

[53](1875) 51 Cal. 15.

In respect to the doctrine of self-government, therefore, this opinion can scarcely be referred to as the opinion of the court as such. Indeed the remarks of Judge McKinstry must clearly be regarded as dictum.

Perhaps the Rhode Island case of City of *Newport* v. *Horton*[54] should also be mentioned in this connection, although it has seldom if ever been cited as supporting the doctrine of an inherent right of local self-government. The issue before the court concerned the validity of an act providing a state-appointed police commissioner for Newport. Declaring that "towns and cities are recognized in the constitution, and doubtless they have rights which cannot be infringed," the court refused to discuss "the full limit and scope of those rights." It was nevertheless expressly assumed, for some unexplained reason, "that the towns and cities in this state have the same rights which towns and cities have in other states under the prevalent form of state government."

Upon the basis of this assumption the court proceeded to analyze a number of cases from other jurisdictions involving legislation that "interfered" with municipal control of police[55] and to discuss in a general way the "principle of local self-government." The conclusions were reached that "the clear weight of authority sustains the right of the legislature to control police," and that "the right of a city to sole control of its police force has not been so reserved as to bring it within article I, section 23[56] or article IV, section 10[57] of the constitution" of Rhode Island.

It must be admitted that under the provisions of the state constitution the lengthy discussion of cases and of the "principle of local self-government" was scarcely justified unless the court was prepared to apply the doctrine of an inherent right of local

[54](1900) 22 R. I. 196, 47 Atl. 312.

[55]Among these were, from the Michigan jurisdiction, the Mahaney case as modified by the Hurlbut and subsequent cases, *supra*; from the Indiana jurisdiction, the Denny case, *supra*; the Nebraska case of State *ex rel.* Attorney General *v.* Moores, *supra*, which had not at this time been overruled, *supra*; Mayor etc. of Baltimore *v.* State *ex rel.* Board of Police (1859) 15 Md. 376; State *ex rel.* Attorney General *v.* Covington (1876) 29 Oh. St. 102; State *ex rel.* Atwood *v.* Hunter (1888) 38 Kan. 578, 17 Pac. 177; Commonwealth *v.* Plaisted (1888) 148 Mass. 375, 19 N. E. 224; and Burch *v.* Hardwicke (Va. 1878) 30 Gratt. 24. With respect to the cases in this list which have not been herein discussed it may simply be said that not one of them applied the doctrine of an inherent right of local self-government.

[56]"The enumeration of the foregoing rights shall not be construed to impair or deny others retained by the people."

[57]"The general assembly shall continue to exercise the powers they have heretofore exercised, unless prohibited in this constitution."

self-government if the conclusion was reached that the legislation in question violated such right. It is nevertheless of vital signification that the court made tardy reference to the specific constitutional clauses which it had in mind and that the entire discussion was built upon the confessed assumption, without apparent investigation, that municipal corporations in Rhode Island enjoyed the same degree of constitutional protection that was afforded in other States. This assumption was wholly unwarranted simply because it is wholly out of harmony with the facts. The probable truth of the matter is that, having resolved to sustain the act under review, the court allowed itself to be careless in its assumptions as well as in its remarks about the "principle of local self-government." Under these circumstances the case cannot with propriety be cited as lending any considerable support to the doctrine here under consideration.

In the recent Ohio case of *State ex rel. City of Toledo* v. *Lynch*,[58] involving an interpretation of the constitutional amendment of 1912 by which the cities of that State were granted power to frame and adopt their own charters, Judge Wanamaker rendered a dissenting opinion which is of interest in connection with the doctrine of an inherent right of local self-government. Examining certain clauses of the Ohio constitutions of 1802 and 1851, he did not hesitate to lay down the broad proposition that "our state constitutions are composed only of *delegated powers*."[59] Having propounded the question: "how did we lose the municipal power that was formerly enjoyed and exercised by our municipalities under the common law?" he delivered himself of the following answer:

"The state legislature, for over a century, has asserted and assumed, without constitutional right, to be the source of all municipal power, and in this has been staunchly and overwhelmingly supported by our courts, which, together with a century or more of acquiescence on the part of the people, has built up a false system of political power unintended and unthought of by the Fathers in reference to municipal rule.

"By reason of the many years of legislative invasion and usurpation of the powers of local self-government, believed by the Fathers to be wisely left to the towns and villages as they were exercising them at the time the several constitutions of Ohio were adopted, there developed in widely different portions of the state a movement to reclaim and restore this political power back into

[58] (1913) 88 Oh. St. 71, 102 N. E. 670.

[59] 88 Oh. St. at p. 129, 102 N. E. at p. 672.

the hands of the people, to prevent further aggressions on the part of the legislature, and to give the cities and villages of Ohio now what they had before any constitution of the state was adopted, to-wit, full local self-government.

"The legislatures of Ohio, sanctioned by our courts, have been responsible for this embezzlement of municipal powers. Instead of standing on the original proposition that "all political power is inherent in the people," the legal and logical effect of the position of the legislature of Ohio has been, "No political power for municipalities is inherent in the people save what the legislature sees fit to give them."

This expression of opinion represented the dissenting view of only a single member of the court and even in his opinion may doubtless be regarded as dictum. It is of interest chiefly because of its extremeness and because it illustrates that the doctrine of an inherent right of local self-government has not as yet been cast among the judicial discards of our law.

There are a few other cases that are occasionally referred to as supporting the doctrine of an inherent right of local self-government;[60] but it is so obvious, upon examination, that every one of these cases turned upon the construction and application of some express provision of the state constitution that it scarcely seems necessary to subject them to detailed analysis.

The doctrine of an inherent right of local self-government has not failed to receive a measure of support from certain juristic commentators. In consideration of the fact that the name of Judge Cooley has been indissolubly linked with the expression and exposition of the doctrine in the famous Hurlbut case, one might naturally expect to find the principle set forth in no uncertain terms in the standard works of this eminent jurist on *Taxation* and *Constitutional Limitations*. One's expectation in this regard is doomed to disappointment. In his treatise on *Taxation*[61] he indeed declares that "in the general framework of our republican governments nothing is more distinct and unquestionable than that they recognize the existence of local self-government and contemplate its permanency. Some state constitutions do this in express terms, others by necessary implication." The distinguished author does not define what he means by "necessary implication," but

[60]For example, Luehrman *v.* Taxing District (Tenn. 1879) 2 Lea, 425; People *ex rel.* McCagg *v.* Mayor, etc. of Chicago (1869) 51 Ill. 17; Parks *v.* Board of Commissioners (C. C. 1894) 61 Fed. 436; Graham *v.* Fresno (1907) 151 Cal. 465; 91 Pac. 147; Helena Consolidated Water Co. *v.* Steele (1897) 20 Mont. 1, 49 Pac. 382.

[61]Cooley, Taxation (2nd ed.) 678.

there is certainly a vast difference between "necessary implication" and "general implication" founded upon the history and spirit of our institutions.

Again, in his work on *Constitutional Limitations*,[62] Judge Cooley asserts that "the several state constitutions have been framed with this system [of local self-government] in view and the delegation of powers which they make, and the express and implied restraints which they impose thereupon, can only be correctly understood and construed by keeping in view its present existence and anticipated continuance." But the judge fails to make clear that he means by the "implied restraints" imposed by state constitutions restraints that are implied, not from specific constitutional provisions in point, but merely from a consideration of general and fundamental principles. If by "implied restraints" he means restraints that are specifically implied, there is nothing in this expression of opinion that would not meet with hearty acceptance by the most loyal advocate of the doctrine of legislative supremacy over municipal corporations.

Moreover, over against these passages of somewhat doubtful meaning must be set another passage from his work on *Constitutional Limitations*. He says:[63]

"If the courts are not at liberty to declare statutes void because of their apparent injustice and impolicy, neither can they do so because they appear to the minds of the judges to violate fundamental principles of republican government, unless it shall be found that these principles are placed beyond legislative encroachment by the constitution."

Certainly the fundamental principle of local self-government is no more sacred than the fundamental principles of republican government. Indeed, from the American point of view it is probably nothing more nor less than one of the principles of republican government. To say the least, therefore, it is manifest that as a text-writer Judge Cooley was by no means clear and emphatic in respect to this doctrine of law which he is alleged to have fathered.

Some years ago Mr. Amasa M. Eaton, a distinguished attorney of Providence, read before the American Bar Association a paper[64] in which he made an elaborate examination of historical and legal

[62]Cooley, Constitutional Limitations (7th ed.) 264.
[63]*Ibid.*, (7th ed.) 237.
[64](1902) 25 Rep. Am. Bar Assn., 292-372.

sources bearing upon the origin of municipal corporations in England in order to show that

"Municipal corporations in England had come into unconscious being by a process of evolution and development through charters from lords of manors and from kings holding manors as of their own demesne, *confirming the enjoyment of liberties already won and enjoyed,* and sometimes extending such charters, serving as models for charters to new towns, giving them the right to the enjoyment of similar liberties *in futuro,* all in return for a stipulated fee-farm rent".[65]

The author of this scholarly investigation gave little attention to historical and legal sources bearing upon the origin and development of municipal corporations in this country. He clearly implied, however, that, as institutions inherited from the mother country, such corporations should be looked upon as a continuous development from the early English institutions of like character, and therefore governed as to their rights by the legal principles which were to some extent applied in England and should have been applied in far more more extended measure.[66] Upon this theory he gave unqualified endorsement to the doctrine of an inherent right of local self-government in the United States and urged that the principle be forthwith applied by the courts even though such application necessitate the summary overruling of many decisions to the contrary.[67] Believing that municipal corporations in the American colonies sprang into existence "sometimes . . . through conscious self-institution (by their own written agreements), sometimes through unconscious self-institution, as when the first settlers through knowledge of town government brought with them from England, fell at once and naturally, but without any authority from England, into self-government through town organization, these towns being afterward acknowledged by the local legislature as valid corporations, from which it follows that they were not created by the legislature,"[68] he arrived at the following conclusion:[69]

"In the light of this examination of the facts of history, ignored by writers on municipal incorporation during the last century, it

[65] *Ibid.,* p. 360.
[66] *Ibid.,* pp. 293, 294, 360, 369-371.
[67] *Ibid.,* pp. 371, 372.
[68] *Ibid.,* p. 360.
[69] *Ibid.,* p. 369.

is plain we must revise our conceptions of the elementary principles involved. When we find how municipal incorporations arose in England, how our forefathers fell into it naturally, upon reaching these shores, without authority other than their own self-asserted authority, how legislatures acknowledged that these self-incorporated towns were valid corporations, we are in a position to realize how utterly erroneous is the doctrine that only the king can incorporate, that towns are only the creatures of the state and are subject to its uncontrolled will, in the absence of express provisions to the contrary in the Constitution. Municipal incorporation is not the exercise of a power emanating from King, Parliament or Legislature—the gift of a superior to an inferior. It was the result of the evolution of local rights and liberties as between the inhabitants of a manor and its lord, . . . The rights of municipal corporations therefore are not subject to the uncontrolled and uncontrollable will of the legislature any more than any other fundamental Anglo-Saxon rights, and local self-government itself cannot be interfered with by the legislature even if the state constitution be silent on the subject, reserving always to the legislature power over all general legislation and power to mould the exercise of town power when requested by a town itself."

The repetitious endorsement which is given to this doctrine by Judge McQuillin in his recent treatise has already been mentioned. At one point[70] he offers in support of the doctrine a list of cases from eleven jurisdictions and includes the authority of the highest court of the land. The California,[71] Maryland,[72] Montana,[73] New

[70]Municipal Corporations, I, p. 385, n. 13.

[71]The case of Graham *v.* Fresno (1907) 151 Cal. 465, 91 Pac. 147, turned upon a construction of the specific home rule provisions of the state constitution; the doctrine of inherent self-government was not discussed at all. In Blanding *v.* Burr (1859) 13 Cal. 342, which upheld the right of the legislature to validate a claim against the city of San Francisco, the court was somewhat extreme in its assertion of the doctrine of legislative supremacy over municipal corporations, and there was not a single sentence that could be construed to support the doctrine in question. The case of the People *v.* Lynch, already discussed, *supra*, which is the only California case remotely in point, was not cited at this point by Judge McQuillin.

[72]In the case of Talbot County *v.* Queen Anne's County (1878) 50 Md. 245, (sustaining an act of the legislature that imposed upon one county the duty of levying taxes for the construction and maintenance of a bridge lying wholly within another county) the chief expression that might be construed in point was this: "Now if it be true that the act in question did attempt to impose upon the Commissioners of Talbot County the duty of levying taxes and assuming obligations for purposes not within the ordinary functions of municipal government, such as that of a county organization, the correctness of the position taken by the appellants could not be controverted." Elsewhere the court referred to limitations imposed upon legislative action by "some one or more of those fundamental maxims of right and justice with respect to which all governments and society are supposed

York,[74] and Texas[75] cases cited do not by any fair interpretation lend support to the doctrine in question. The Nebraska case cited —that of *State* v. *Moores*—was, as we have had occasion to note, summarily overruled in that jurisdiction.[76] The case cited as having lent the sanction of the United States Supreme Court[77] to this doctrine held void an act of the legislature of Louisiana which conferred upon the city of New Orleans the power to abrogate contracts into which it had entered with private persons. The court said:[78]

"It is true . . . that the legislature may at any time restrict or revoke at its pleasure any of the powers of a municipal corporation, including among others that of taxation, subject, however, to this qualification, which attends all state legislation, that its action in that respect shall not conflict with the prohibitions of the Constitution of the United States and, among other things, shall not operate directly upon contracts of the corporation so as to impair their obligation by abrogating or lessening the means of their enforcement."

The opinion simply declared that an act of the state legislature, whether or not it happened to be an act dealing with the powers of a municipal corporation, could not impair the obligation of a contract. It was the rights of private persons under a specific constitutional provision which were under discussion and not the

to be organized." It is, however, wholly unnecessary to inquire what the court may have meant by such utterances, for, since the act in question was fully sustained, these expressions of the court were manifestly dicta. Nor do they in any event clearly sustain the doctrine of an inherent right of local self-government.

[73]The opinion of the court in the case of Helena Consolidated Water Co. *v.* Steele (1897) 20 Mont. 1, 49, Pac. 382, turned clearly upon the application to the issue at bar of a specific provision of the constitution prohibiting the legislature from levying taxes "upon the inhabitants or property in any city or town for municipal purposes." In the opinion handed down there is little to show that the court had even remotely in mind the doctrine of an inherent right of local self-government.

[74]As clearly indicated, *supra*, , the case cited—that of Rathbone *v.* Wirth (1896) 150 N. Y. 459, 45 N. E. 15,—cannot be regarded as sustaining the doctrine in question.

[75]The case of Morris & Cummings *v.* State *ex rel.* Gussett (1884) 62 Tex. 728, simply held, among other points wholly irrelevant to this doctrine, that the legislature could not, by the repeal of a municipal charter, impair the obligation of contracts into which the city had validly entered. The case of *Ex parte* Lewis, *supra* , the only Texas case that is even remotely in point, was not here cited by Judge McQuillin, although elsewhere he discusses this case at some length.

[76]See *supra*, p. 201.

[77]Wolff *v.* New Orleans (1880) 103 U. S. 358.

[78]At p. 365.

rights of the municipal corporation; and there was not a single line of the opinion that could by the thinnest possibility be construed to defend any inherent right of local self-government.

It seems obvious, therefore, that in the light of the survey undertaken in this paper, which attempts to cover the entire list of cases alleged to be in point, the eleven jurisdictions referred to by the eminent commentator must in fact be reduced to not more than five—namely, Michigan, Indiana, Iowa, Kentucky, and Texas. Moreover, as we have had occasion to note, it is highly questionable whether Michigan and Texas ought properly to be included in this list. All of which, considered in connection with the heroic struggle which American cities have made to assert a measure of freedom from legislative domination in their local affairs, only goes to show that the doctrine that a city enjoys in any degree whatever a right of local self-government, aside from such rights as may be expressly or by clear and specific implication guaranteed by the fundamental law of the State, is a distinctly and conspicuously exceptional doctrine of American law. The extent of its application has been exceedingly limited. Indeed, but for the uncertainty that seems to prevail in some quarters as to the exact status of the law on the subject and but for the profoundness of conviction with which the doctrine is asserted and urged by its advocates, this extended analysis of cases would scarcely be justified.

(TO BE CONCLUDED.)

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